

January 24, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Benjamin D. Grove

Date of Filing: December 24, 2002

Case Number: TFA-0012

On December 24, 2002, Benjamin D. Grove (the Appellant) filed an Appeal from a final determination issued on November 26, 2002, by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed on October 30, 2002, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination withheld a responsive document requested by the Appellant. This Appeal, if granted, would require ORD to release additional information to the Appellant.

I. BACKGROUND

On October 30, 2002 the Appellant filed a request for information with ORD seeking a 112 page document entitled "Identification of Aircraft Hazards" (the Report). Determination Letter at 1. On November 26, 2002, ORD issued a determination letter (the Determination Letter) withholding the Report in its entirety under FOIA Exemption 2. Determination Letter at 1. On December 24, 2002, the Appellant submitted the present Appeal in which he challenges ORD's withholding determination.

II. ANALYSIS

A. Applicability of Exemption 2

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Only Exemption 2 is at issue in the present case. Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency."

5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (“low two” information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (“high two” information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, “high two” information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the “high two” category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under “high two” must be able to show that: (1) the requested information is “predominantly internal,” and (2) its disclosure “significantly risks circumvention of agency regulations or statutes.” *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The Report is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which “does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.” *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*). The Report at issue here is an analysis of the potential hazards posed by aircraft to a proposed nuclear waste repository at DOE’s Yucca Mountain Site. The Report itself states that its intended use “is to provide inputs for further screening and analysis of the identified aircraft hazards.” Identification of Aircraft Hazards at 1. Thus the Report addresses safety hazards which might affect DOE siting decisions. At this stage, this is an internal matter.

The Report meets the second prong of the *Crooker* test as well. The Appellant correctly notes that ORD has not cited a specific statute or regulation that would be circumvented if the Identification of Aircraft Hazards report were to be disclosed. Appeal at 1. However, it is well settled that an agency need not cite a specific regulation or statute to properly invoke the “high two” exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

The Report is a preliminary roadmap for assessment of the potential threats posed by aircraft to a proposed high level nuclear waste facility. Disclosure of the report has the potential to educate terrorists (and other individuals or entities seeking to harm the national security) about the proposed repository’s vulnerabilities. Therefore, releasing the report could allow terrorists to circumvent DOE’s efforts to comply with its mandate to provide a secure and safe repository for high level nuclear waste. Accordingly, we find that any information contained in the report that would educate individuals or other entities with interests adverse to the common defense and national security may be properly withheld under the “high two” prong of Exemption 2.

B. Duty to Segregate

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Accordingly, ORD should have also reviewed the withheld material under the standard set forth in 5 U.S.C. § 552(b). However, there is no indication in the record that ORD has done so. Accordingly, we are remanding this portion of the Appeal to ORD. On remand, ORD must review the Identification of Aircraft Hazards report in order to determine whether any portions of it could be released without harming the interests protected by Exemption 2 (or any other applicable FOIA exemption). It must then issue a new determination letter describing this review and explaining its results.

C. Questions Directed to DOE

The Appeal contains ten questions which the Appellant would like the DOE to answer. This portion of the Appeal shall be denied. It is well settled that the FOIA does not require an agency to respond to questions posed as FOIA requests. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985); *DiViao v. Kelly*, 571 F.2d 538, 542-43 (10th Cir. 1978); *Matthew Cherney, M.D.*, 27 DOE ¶ 80,239 (1999). Moreover, these ten questions were not part of the Appellant's request for information. It is well settled that an appellant may not use the appeal process to expand the scope of a FOIA request. *F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991).

It Is Therefore Ordered That:

- (1) The Appeal filed by Benjamin D. Grove, Case No. TFA-0012, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.
- (2) The Appeal is hereby remanded to the Office of Repository Development to conduct a segregability review in accordance with the instructions set forth above.
- (3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 24, 2003